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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

RONALD CHICK, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause precludes the continuation of a criminal prosecution and the imposition of punishment by way of that criminal prosecution where the defendant has been previously punished in a civil forfeiture proceeding regarding the very same offense conduct which provides the basis for the later criminal prosecution?

2. Whether the government can avert the Double Jeopardy Clause's prohibition against multiple prosecutions and multiple punishments simply by instituting a criminal prosecution charging the defendant with conspiracy even though that same defendant had previously been punished by the same court for the same criminal offense conduct by way of a civil forfeiture proceeding?

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PETITION FOR A WRIT OF CERTIORARI

Ronald Chick, through his attorney Todd Maybrown, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The panel opinion of the court of appeals (App., infra, 1a-15a) is reported at 61 F.3d 682. The decision of the district court (App.., infra, 17a-20a) is unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit delivered its decision on July 14, 1995. A petition for rehearing was denied on August 31, 1995. App., infra, 16a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States provides: "[N]or shall any person be subject for the same offense to

be twice put in jeopardy of life or limb." The provisions of 18 U.S.C. §§ 2511-13 are reproduced at App., infra, 21a-36a.

STATEMENT OF THE CASE

A. Proceedings in the District Court

During March 1993, an FBI agent applied for a warrant to search the residence and business of Ronald Chick based upon allegations that Mr. Chick had been involved in the unlawful interception of satellite television signals and the unlawful interception of decrypted cable television programming. The application stated that Mr. Chick had been under investigation since 1987, and that it was the agent's belief that he had been involved in the modification and sale of satellite and cable television "descramblers" since that time. In support of this claim, the agent stated

that he had received information from several customers and several confidential sources of information.

Relying on the Agent's application, a United States Magistrate approved a search warrant for Mr. Chick's residence and a storage locker. Government agents executed the warrant on April 1, 1993, seizing numerous items. A third search warrant was issued on April 7, 1993, for the search of a mailbox located in Puyallup, Washington.

Thereafter, on June 14, 1993, the government served Mr. Chick with a notice of seizure of several items -- including televisions, disc players, videotape players, descramblers, converters, tools, and other electronic equipment -- alleging that he had violated the "WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS STATUTE." Mr. Chick filed a timely notice to contest the forfeiture.

The government then instituted a civil forfeiture action pursuant to 18 U.S.C. § 2513 in the United States District Court for the Western District of Washington. See United States v. Miscellaneous Electronics Equipment Valued at $116,000, No. C93-15468WD (W.D. Wash. 1993). The forfeiture complaint listed approximately $116,000 of property that the government intended to forfeit, including a vast array of equipment relating to satellite and cable television services. The complaint specifically alleged that the property was connected to defendant's violations of the Electronic Communications Privacy Act, and thus forfeitable under 18 U.S.C. § 2513.

Mr. Chick and the government agreed to resolve the civil forfeiture action in July 1994. Thereafter, on August 31, 1994, the district court signed off on the parties' Consent Judgment for Forfeiture

which required Mr. Chick to forfeit much of the seized property to the government. Each of the forfeited items related to Mr. Chick's alleged violations of 18 U.S.C. §§ 2511 and 2512.[1] These items are valued in excess of $50,000.

More than eight months after the government initiated the forfeiture proceeding, a federal grand jury returned an indictment against Ronald Chick charging conspiracy to violate 18 U.S.C. § 2512 and twelve substantive violations of 18 U.S.C. § 2512. Mr. Chick moved to dismiss the Indictment as a violation of the Double Jeopardy Clause. Relying on this Court's trilogy of cases regarding successive civil and criminal proceedings -- United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d

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[1] By this judgment, the government did not forfeit Mr. Chick's personal entertainment equipment and miscellaneous tools.

487 (1989); Austin v. United States, 509 U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993); and Dept. of Revenue of Montana v. Kurth Ranch, 511 U.S. ___, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) -- Mr. Chick argued that the prior civil forfeiture constituted punishment for the same offense conduct which gave rise to the criminal indictment.[2]

The district court denied the motion. App., infra, 17a-20a. In rejecting Mr. Chick's double jeopardy challenge, the court simply stated:

> The question then becomes whether the forfeiture and the impending prosecution were based on the same offense. As the government maintains, the conspiracy and the substantive crime are not the same

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[2] A superseding indictment was returned on October 18, 1994, after Mr. Chick had filed his motion to dismiss but one day before the district court ruled on the motion. The government has conceded that the amendments to the Indictment did not change the analysis of the legal issues raised in Mr. Chick's motion to dismiss.

> crime for purposes of double jeopardy. United States v. Saccoccia, 18 F.3d 795, 798 (9th Cir. 1994). In addition, Ronald [Chick] is not charged with possession of contraband, he is charged with the sale of descramblers on specific dates. In each instance, the sales occurred before the forfeited property was seized. Accordingly, the motion to dismiss on double jeopardy grounds is denied.

Id. at 17a-18a. The court then certified the matter for interlocutory appeal and stayed all proceedings pending the resolution of Mr. Chick's appeal. Id. at 18a-19a.

B. Proceedings in the Court of Appeals

Ronald Chick subsequently filed an interlocutory appeal in the Ninth Circuit Court of Appeals. A panel of the court affirmed, holding that the criminal prosecution did not violate the Double Jeopardy Clause. App., infra, 1a-15a.

As a threshold matter, the court agreed that it had jurisdiction to hear the interlocutory appeal. Id. at 4a-8a.

The court explained that where judgment has been entered in a civil forfeiture proceeding, and a defendant moves to dismiss a subsequent criminal prosecution on double jeopardy grounds, a pretrial order denying the motion to dismiss is appealable under the collateral order exception to the final judgment rule and Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). The court noted that Mr. Chick should not be forced "to endure the personal strain, public embarrassment, and expense of a criminal trial" if there is a colorable claim that the Double Jeopardy Clause has been violated. Id. at 8a (quoting Abney, 431 U.S. at 661).

The court then turned to the merits of Mr. Chick's claims. The court first concluded that the civil forfeiture of Mr. Chick's electronic equipment constituted punishment within the meaning of the

Double Jeopardy Clause. Id. at 9a-11a. According to the panel, Congress did not intend 18 U.S.C. § 2513 to serve solely a remedial purpose. As the legislative history illustrates, the forfeiture statute was specifically designed to punish and to deter criminal conduct. Id.

Nevertheless, the panel concluded that the Double Jeopardy Clause was not violated, because the civil punishment and any subsequent punishment in the criminal case would not be based upon the same offenses. Id. at 11a-15a. Citing Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), the court explained that punishment for two statutory offenses arising out of the same criminal act or transaction does not violate the Double Jeopardy Clause if each statute requires proof of an additional fact which the other does not. Applying that test, the panel held that Mr. Chick's

criminal charges required proof of facts which the civil forfeiture action would not have required to be proven. The court defended its decision by noting that the civil forfeiture proceeding only required proof that the seized electronic equipment was used to intercept electronic communications in violation of 18 U.S.C. § 2511. Id. at 12a.[3] By contrast, the

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[3] The panel claimed that the Consent Judgment entered in the civil forfeiture case states that miscellaneous electronic equipment was "subject to forfeiture to the United States under 21 U.S.C. § 2513 because it was used to intercept electronic communications in violation of 18 U.S.C. § 2511." Unfortunately, the court misread the key portion of the Consent Judgment. That judgment actually stated that the miscellaneous electronic equipment was "hereby fully and finally forfeited to the United States pursuant to 18 U.S.C. §§ 2511 and 2512 . . . ." (emphasis added). The parties included the reference to § 2512 because they understood that several items of property were not forfeitable pursuant to the interception statute (§ 2511); this property was forfeitable only because of Mr. Chick's alleged assembly, possession and sales of descramblers in violation of § 2512. The panel's fact-bound ruling, although obviously erroneous, does not

court contended that the civil forfeiture proceeding did not require proof that Mr. Chick conspired to assemble, possess or sell satellite descrambler modules or that he sold illegally modified satellite descramblers. Therefore, applying the Blockburger test, the court found that the counts contained in the superseding indictment were based on different offenses from the offenses which gave rise to the civil forfeiture. Id. at 12a-13a.

In addition, the panel concluded that Mr. Chick's arguments with respect to the conspiracy count were expressly foreclosed by this Court's decision in United States v. Felix, 503 U.S. 378, 112 S.Ct. 1377, 118 L.Ed.2d 25 (1992), and the Ninth Circuit's decision in United States v. Saccoccia, 18 F.3d 795 (9th Cir. 1994).

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warrant the Court's attention, and for that reason Mr. Chick does not independently present it as a ground for review.

Id. at 14a-15a. According to the panel, the Double Jeopardy Clause would not be violated by the forfeiture of electronic equipment used by Mr. Chick to intercept electronic communications in violation of 18 U.S.C. § 2511 and then a subsequent prosecution of Chick for conspiring to use the same equipment for the same illegal purposes. Id.

REASONS FOR GRANTING THE WRIT

This case presents two related and important issues under the Double Jeopardy Clause. First, the Ninth Circuit's holding -- that the court must apply the "same offense" test for double jeopardy analysis when the government seeks criminal and civil penalties in separate proceedings -- conflicts with this Court's decisions regarding the application of the Fifth Amendment Double Jeopardy Clause in Halper and Kurth Ranch. Second, the Ninth

Circuit held that the Double Jeopardy Clause would not be violated by the forfeiture of equipment used to intercept electronic communications in violation of 18 U.S.C. § 2511 and then a subsequent prosecution for conspiring to use the same equipment for the same illegal purposes. The panel's holding cannot be reconciled with this Court's decision in Kurth Ranch. Because both issues have significant practical consequences for law enforcement agencies and for criminal prosecutions throughout the country, this Court's review is warranted.

A. The Panel Improperly Relied upon the "Same Elements" Test when Evaluating Petitioner's Double Jeopardy Claims

Citing United States v. Dixon, 509 U.S. ___, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) and Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), the Ninth Circuit concluded that

Mr. Chick's double jeopardy arguments must fail because the forfeiture and the criminal charges were based upon different criminal offenses. App., infra, 11a-14a. The panel's reliance on the "same offense" test conflicts with this Court's decisions in United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989) and Dept. of Revenue of Montana v. Kurth Ranch, 511 U.S. ___, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994).

In Halper, a unanimous Court endorsed a "same conduct" test for double jeopardy analysis when the government sought criminal and civil penalties in separate proceedings, as it has here.

> Nothing in today's ruling precludes the Government from seeking the full civil penalty against a defendant who previously has not been punished for the same conduct, even if the civil sanction imposed is punitive. In such a case, the Double Jeopardy Clause simply is not implicated . . . . In other words, the only proscription established by our ruling is that the Government may not

> criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct.

Halper, 490 U.S. at 450-51 (emphasis added).[4]

Perhaps more importantly, not one of the justices in Kurth Ranch (decided less than a year after Dixon) supported the application of a "same elements" test. Indeed, the "same elements" argument was laid to rest in the very first paragraph of the majority opinion in Kurth Ranch:

> This case presents the question of whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty for the same conduct may violate the constitutional prohibition

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[4] Halper was decided prior to Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), when Blockburger was the controlling double jeopardy precedent. Had the Court believed that the Blockburger "same elements" test applied in the context of a criminal prosecution followed by a civil sanction, it would not have utilized a "same conduct" test in Halper.

> against successive punishments for the same offense.

Kurth Ranch, 114 S.Ct. at 1941 (emphasis added). The members of the Kurth Ranch Court mentioned neither Dixon nor Blockburger.

If there is any merit to the panel's conclusion that the "same elements" test applies when one action is civil and the other is criminal, it is reasonable to expect that at least one of the dissenters in Kurth Ranch would have raised the issue. However, even Justice Scalia, the driving force behind the Court's move to overrule the "same conduct" test of Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), does not mention the "same elements" test or Dixon or Blockburger in his forceful dissenting opinion in Kurth Ranch.

The question whether to apply the "same offense" test or the "same elements"

test in cases such as this has engendered considerable confusion and has led to a conflict in the lower courts. Compare United States v. Rhodes, 62 F.3d 1449, 1452 (D.C. Cir. 1995), (no double jeopardy violation where the administrative proceeding and the subsequent criminal trial punished defendant for "factually distinct offenses") with United States v. Pierce, 60 F.3d 886, 889 (1st Cir. 1995) ("Double Jeopardy Clause protects against both successive punishments and successive prosecutions for the same criminal offense"), petition for cert. pending, No. 95-6479 (October 19, 1995).

The confusion is evident within the several decisions of the Ninth Circuit. That court appeared to adopt the "same conduct" approach in United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1216 (9th Cir.1994), as amended on denial of reh'g, 56 F.3d 41 (1995) (noting that

the forfeiture complaint was based on the "same conduct addressed in claimants' criminal case, and it sought to forfeit title to the claimants' property on the basis of precisely the same violations of the same statutes"), petition for cert. pending, No. 95-346 (August 28, 1995).[5] However, another panel of the same court suggested that the "same offense" test may have application in cases such as this. See One 1978 Piper Cherokee Aircraft, 37 F.3d 495 (9th Cir. 1994) (remanding case for further consideration by district court).[6]

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[5] The United States' petition for certiorari in $405,089.23 U.S. Currency raises the same question raised in this portion of Ronald Chick's petition. See No. 95-346 (Issue II).

[6] The One 1978 Piper Cherokee Aircraft court also held that forfeitures of instrumentalities or proceeds of drug trafficking are "a species of greater offenses," because the forfeiture statutes "incorporate the elements of [the] criminal offenses." 37 F.3d at 495. Accord United States v. Usery, 59 F.3d

The panel's strict application of the "same elements" test is not sensible in the context of a double jeopardy case such as this. Application of the test is impractical, and oftentimes unworkable, where a court is seeking to compare a criminal prosecution with a civil forfeiture proceeding. The two separate proceedings -- each of which is considered a mechanism to impose punishment -- cannot be compared by reference to the elements of any statutory offense. To fairly evaluate whether a person has been subjected to multiple prosecutions and/or multiple punishments in such a situation the court must ascertain whether the

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568, 573-74 (6th Cir. 1995), petition for cert. pending, No. 95-345 (August 28, 1995). In this regard, forfeitures pursuant to 18 U.S.C. § 2513 are analogous to forfeitures pursuant to 21 U.S.C. § 881 because they require a violation of an underlying criminal offense statute (either § 2511 or § 2512 of the Communications Privacy Act).

government is seeking to exact a second punishment for the very same offense conduct which provided the foundation for the first punishment proceeding. See Halper, 490 U.S. at 450-51.[7] To conclude otherwise would undermine the Double Jeopardy Clause by allowing the government to obtain multiple punishments by way of successive prosecutions for the same offense conduct.

The panel's confusion is evidenced by its statement that Mr. Chick's criminal prosecution requires proof of a new fact -- "participation by the defendant" -- which was not required in the civil forfeiture proceeding. Id. at 14a. This factual distinction is of no

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[7] One cannot commit the offense of forfeiture. See Libretti v. United States, ___ U.S. ___, ___ S.Ct. ___, 1995 WL 648120, 64 U.S.L.W. 4005 (Nov. 7, 1995). Forfeiture is simply a procedure for imposing a sanction predicated upon the commission of certain offense conduct.

constitutional significance for it tells us nothing about whether the claimant/defendant was twice punished for the same offense conduct. If this fact was dispositive, the courts would never find a double jeopardy violation in a case involving a successive civil forfeiture proceeding and criminal prosecution.

Taken to its logical conclusion, the panel's holding would effectively eviscerate the constitutional principles enunciated in Halper and Kurth Ranch. The Ninth Circuit's view constitutes a significant departure from the controlling decisions of this Court. That departure warrants this Court's review.

B. The Panel Mistakenly Concluded that A Substantive Crime and a Conspiracy to Commit that Crime are Never the Same Offense for Double Jeopardy Purposes

This Court has recently held that, in many circumstances, a substantive crime and a conspiracy to commit that crime are

not the same offense for double jeopardy purposes. See United States v. Felix, 503 U.S. 378, 112 S.Ct. 1377, 118 L.Ed.2d 25 (1992). In Felix, the defendant was prosecuted for substantive crimes in one jurisdiction and conspiracy in another, where there was merely a partial overlap in the evidence. Only two of the nine overt acts alleged in an Oklahoma conspiracy prosecution had been the subject of an earlier Missouri prosecution. Concluding that there was no double jeopardy violation, the Court explained:

> The actual crimes charged in each case were different in both time and place; there was absolutely no common conduct linking the alleged offenses. In short, none of the offenses for which Felix was prosecuted in the Oklahoma indictment is in any sense the "same offense" as the offense for which he was prosecuted in Missouri.

503 U.S. at 385.

The Ninth Circuit faced similar

issues in United States v. Saccoccia, 18 F.3d 795 (9th Cir. 1994). Analyzing Felix, the Saccoccia court explained:

> The Supreme Court has made clear that mere overlap in proof between two prosecutions does not violate the Double Jeopardy Clause. Further, while the substantive charges in Rhode Island and California are indisputably related, they involve distinct transactions occurring at different times in different venues.

18 F.3d at 799 (citations omitted).. For this reason the Ninth Circuit held that the subsequent California indictment did not violate the Double Jeopardy Clause's prohibition against multiple prosecutions for the same offense.

The panel concluded that Felix and Saccoccia foreclosed Mr. Chick's double jeopardy claims regarding the conspiracy count. App., infra, 14a-15a. In essence, the Ninth Circuit held that a substantive crime and a conspiracy to commit that crime are never the same offense for

double jeopardy purposes.

As explained above, this aspect of the panel's decision is mistaken insofar as it rests upon the "same elements" test of Blockburger and Dixon. Moreover, the panel stretches Felix too far by suggesting that punishment for a substantive crime and a later attempt to impose punishment for a conspiracy to commit that same crime will never lead to a double jeopardy violation. This Court did not endorse such a broad conclusion in Felix.[8]

The panel's holding is particularly surprising because this Court appeared to embrace the opposite conclusion in Kurth Ranch. There, the state of Montana

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[8] Unlike Felix (and Saccoccia for that matter), this is not a case involving a mere overlap of proof between successive proceedings. Rather, the government here seeks to impose a second punishment for the same offense conduct which formed the basis of the prior punishment proceeding.

imposed a tax "on the possession of dangerous drugs." 114 S.Ct. at 1941-42 (discussing Montana Code Ann. § 15-25-11). Although all of the claimants (except one) pled guilty only to the crime of conspiracy but no substantive offense regarding possession of the drugs, see 114 S.Ct. at 1492 & n. 9, not one justice suggested that Felix precluded the Kurths' double jeopardy challenge.

This Court should take review and make explicit what is now only implicit in the Kurth Ranch decision. Felix does not compel a finding that a substantive crime and a conspiracy to commit that crime can never constitute the same offense for double jeopardy purposes. On the contrary, the government should not be permitted to avert the Double Jeopardy Clause's prohibition against multiple prosecutions and multiple punishments simply by instituting a criminal

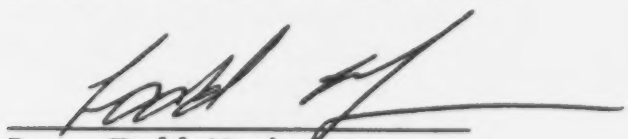
prosecution charging the defendant with conspiracy after that same defendant had been punished by the same court for the same offense conduct by way of a civil forfeiture proceeding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ALLEN, HANSEN & MAYBROWN,



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APPENDIX A

United States Court of Appeals,
Ninth Circuit.

No. 94-30395.

Decided July 14, 1995.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RONALD D. CHICK,

Defendant-Appellant.

After civil forfeiture of defendant's surveillance equipment, he was charged with selling and conspiring to sell illegally modified satellite descramblers. The United States District Court for the Western District of Washington, Walter T. McGovern, Senior District Judge, denied defendant's motion to dismiss for violation of double jeopardy, and certified issue for interlocutory appeal. The Court of Appeals, T.G. Nelson, J., held that: (1) defendant had right to interlocutory appeal of pretrial order; (2) forfeiture of surveillance equipment was "punishment" for double jeopardy purposes; but (3) subsequent prosecution for offenses requiring proof of different facts were not barred by double jeopardy clause. Affirmed.

Appeal from the United States District Court for the Western District of Washington.

Appendix A

Before: BROWNING, WRIGHT, and NELSON, Circuit Judges.

T.G. NELSON, Circuit Judge:

Ronald Chick interlocutorily appeals the district court's denial of a motion to dismiss his criminal prosecution on the basis of double jeopardy. Chick is charged with one count of conspiring to sell illegally modified satellite descramblers in violation of 18 U.S.C. § 371 and § 2512(1)(b), and seventeen counts of selling descramblers in violation of 18 U.S.C. § 2512(1)(b). Chick contends the criminal charges should be dismissed because he has already been subjected to punishment for the same offenses through a civil forfeiture action under 18 U.S.C. § 2513, which ultimately resulted in the entry of a consent judgment. We have jurisdiction over this interlocutory appeal, and we affirm.

I. FACTS AND PRIOR PROCEEDINGS

Based on an FBI agent's affidavit alleging that Chick illegally modified and sold television "descrambler modules," which allowed users to receive cable and satellite television channels without payment, a magistrate issued warrants to search Chick's house and storage locker. The warrants were executed on April 1, 1993, and a vast array of items were seized, including more than fifty descramblers.

On November 19, 1993, the Government filed a civil complaint seeking forfeiture of equipment seized from Chick's

residence. The complaint alleged that the seized equipment was subject to forfeiture under 18 U.S.C. § 2513, because it was used to intercept electronic communications through satellite television descramblers and the unauthorized interception of private satellite video communications, either scrambled or encrypted, for financial gain in violation of 18 U.S.C. § 2511. On August 30, 1994, Chick and the Government entered into a consent judgment to settle the forfeiture action, and on August 31, 1994, the case was dismissed.

On July 26, 1994, a grand jury returned an indictment charging Chick and his sister with engaging in a conspiracy to "assemble, possess, and sell" satellite descrambler modules that allowed the descrambling of certain television programming without payment of subscription fees. Chick was also charged with twelve substantive violations of 18 U.S.C. § 2512, for selling illegal descrambler units. On October 18, 1994, the grand jury returned a superceding indictment which charged Chick with five more counts of selling illegal descrambler units.

Before trial, Chick moved to dismiss the criminal charges against him on the grounds that they violated the Double Jeopardy Clause. Chick argued that the prior civil forfeiture of some of the equipment seized from his home constituted punishment for the same offenses charged in the criminal indictment. The district court denied the motion, concluding that the civil forfeiture action and the

impending prosecution were not based upon the same offenses.

Based on United States v. Castiglione, 876 F.2d 73, 75 (9th Cir. 1988), cert. denied, 493 U.S. 954, 110 S.Ct. 365, 107 L.Ed.2d 351 (1989), together with a finding that Chick had raised a colorable double jeopardy claim, the district court certified the issue for an interlocutory appeal and Chick timely filed his Notice of Appeal with this court.

II. JURISDICTION

The Government contends that we lack jurisdiction over this interlocutory appeal because Chick has not been subjected to multiple criminal prosecutions, and because he has yet to be subjected to multiple punishments. In essence, the Government argues that exposure to multiple punishments cannot be interlocutorily appealed because the multiple punishments prong of the Double Jeopardy Clause is not violated until the subsequent punishment is actually imposed. We disagree.

[1] An appeal from a pretrial order denying a motion to dismiss an indictment is typically considered interlocutory, and, therefore, not appealable as a final decision under 28 U.S.C. § 1291. However, where judgment has been entered in a civil forfeiture proceeding, and a defendant moves to dismiss a subsequent criminal prosecution on double jeopardy grounds, we find the pretrial order denying the motion to dismiss appealable under the collateral

order exception to the final judgment rule and Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).[1]

In Abney, the Supreme Court specifically held that "courts of appeals may exercise jurisdiction over an appeal from a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds." Id. at 662, 97 S.Ct. at 2042 (emphasis added). Unlike this case, where Chick seeks to avoid an impending criminal prosecution, Abney involved a defendant's challenge to a second criminal prosecution. Nevertheless, the basis for permitting an interlocutory appeal on double jeopardy grounds in this case is no

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[1] The collateral order exception to the final-judgment rule was first announced in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Cohen recognized a "small class" of district court decisions that finally determine claims collateral to other rights asserted in the action and are too important to be deferred until the whole case is adjudicated. Id. at 546, 69 S.Ct. at 1225-26. The small class of cases defined in Cohen consists of intermediate decisions satisfying three criteria: (1) the district court's order must finally dispose of the question; (2) the issue must be completely collateral to the cause of action asserted; and (3) the decision must involve an important right that would be "lost, probably irreparably," if review must await final judgment. Id.

less compelling than it was in Abney. As the Court acknowledged: Although it is true that a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds lacks the finality traditionally considered indispensable to appellate review, we conclude that such orders fall within the "small class of cases" that Cohen has placed beyond the confines of the final-judgment rule. In the first place there can be no doubt that such orders constitute a complete, formal and, in the trial court, a final rejection of a criminal defendant's double jeopardy claim. There are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee. Hence, Cohen's threshold requirement of a fully consummated decision is satisfied. Moreover, the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence which the Government plans to use in obtaining a conviction. Rather, he is contesting the very authority of the Government to hale him into court to face trial on the charge against him. Id. at 659, 97 S.Ct. at 2040 (footnote omitted) (citations omitted) (emphasis added).

The constitutional right directly

involved in Abney was the right to avoid a second trial. Here, Chick's claimed right is the right to avoid a second punishment. That punishment can only be imposed after a trial. The Government is arguing that it is constitutionally permissible to subject a defendant to a trial even though the district court could not constitutionally impose any sentence if the jury returned a guilty verdict. Whatever may be the merits of the Government's constitutional argument, it has no merit in a Cohen and Abney context, where the issue is one of appealability.

For purposes of our Cohen analysis, it is established that the double jeopardy issue is collateral to the question of guilt, and it was finally decided by the district court when it denied Chick's motion. The third Cohen question, whether the right would be irretrievably lost, calls for a facially different analysis than in an Abney situation. There, the commencement of the trial was itself a violation of the right not to be tried twice. Here, the trial itself would not violate the constitution. However, if the defendant is convicted, and punishment imposed, then the constitutional right not to be doubly punished is lost, even if vindicated on appeal. The only way to avoid that result is to allow an appeal before trial. Permitting an interlocutory appeal prevents the loss of a constitutional right and is thus supported by the analysis in Abney.

In light of the foregoing reasoning and the judgment previously entered in the civil forfeiture proceeding involving

Chick's property, we hold that an appeal of the pretrial order rejecting Chick's claim of double jeopardy falls within the "small class of cases" that have been placed "beyond the confines of the final-judgment rule." Id. at 659, 97 S.Ct. at 2040. Chick should not be forced "to endure the personal strain, public embarrassment, and expense of a criminal trial" if there is a colorable claim that the Double Jeopardy Clause has been violated. Id. at 661, 97 S.Ct. at 2041. On the contrary, if a criminal defendant such as Chick is "to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." Id. at 662, 97 S.Ct. at 2041.

Accordingly, under 28 U.S.C. § 1291 and Abney, we have jurisdiction to hear Chick's interlocutory appeal of the pretrial order denying his motion to dismiss the indictment on double jeopardy grounds.

III. STANDARD OF REVIEW

A district court's denial of a motion to dismiss an indictment on double jeopardy grounds is reviewed de novo. United States v. Goland, 897 F.2d 405, 408 (9th Cir.1990).

IV. DISCUSSION

"[T]he Double Jeopardy Clause protects against three distinct abuses: [1] a second prosecution for the same

offense after acquittal; [2] a second prosecution for the same offense after conviction; and [3] multiple punishments for the same offense." United States v. Halper, 490 U.S. 435, 440, 109 S.Ct. 1892, 1897, 104 L.Ed.2d 487 (1989). Here we focus on whether Chick is exposed to multiple punishments for the same offense.

Based on the reasoning contained in United States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (9th Cir.1994), amended on denial of reh'g, 56 F.3d 41 (1995), the current law in the Ninth Circuit equates at least some civil forfeitures with "punishment" for double jeopardy purposes, and the Fifth Amendment's Double Jeopardy Clause precludes the Government from bringing a separate civil forfeiture action based on the same offense for which a claimant/defendant has already been criminally prosecuted. Correspondingly, it follows that, where a claimant/defendant has been subjected to a civil forfeiture that amounts to punishment and judgment has already been entered, the Fifth Amendment's Double Jeopardy Clause precludes the Government from bringing a separate criminal action for the same offense which the civil forfeiture was based upon.

To determine if a particular forfeiture statute constitutes punishment, courts are directed to consider: (1) whether the statute serves solely a remedial purpose or serves to punish and deter criminal conduct; and (2) whether Congress tied forfeiture to the commission of specific offenses. Id. at 1221, citing

Appendix A

Austin v. United States, --- U.S. ----, ---- - ----, 113 S.Ct. 2801, 2810-12, 125 L.Ed.2d 488 (1993). Chick draws the court's attention to the legislative history of 18 U.S.C. § 2513 in support of his contention that Congress intended that forfeiture statute to serve punitive purposes. Section 2513 of the new chapter provides that any electronic, mechanical or other intercepting device possessed, used, sent, carried, manufactured or assembled in violation of section 2511 or 2512 ... may be seized and forfeited to the United States. This provision adds a significant sanction to the prohibitions of sections 2511 and 2512. The equipment employed in electronic surveillance is usually expensive. The equipment itself often makes the interception possible. Its confiscation will impose an additional penalty on the individual who violates the provisions of sections 2511 and 2512 and prevent further violations using the same equipment. S.Rep. No. 1097, 90th Congress, 2d Session, reprinted in 1968 U.S.C.C.A.N. 2112, 2184 (emphasis added).

We are convinced that Congress did not consider § 2513 to serve solely a remedial purpose. As the legislative history illustrates, § 2513 was specifically designed to punish and deter criminal conduct. And, given the direct reference to 18 U.S.C. § 2511 and § 2512 within the text of § 2513, Congress tied forfeiture to the commission of specific criminal offenses. For these reasons, we hold that the civil forfeiture of Chick's electronic equipment under 18 U.S.C. § 2513 constituted punishment. The punishment arising from Chick's civil

forfeiture and imposition of a separate punishment in Chick's criminal prosecution are both constitutionally permissible, however, if the punishments are not based upon the same offenses.

In Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), the Supreme Court held that punishment for two statutory offenses arising out of the same criminal act or transaction does not violate the Double Jeopardy Clause if "each provision requires proof of an additional fact which the other does not." Id. at 304, 52 S.Ct. at 182. More recently, in United States v. Dixon, --- U.S. ----, ----, 113 S.Ct. 2849, 2856, 125 L.Ed.2d 556 (1993), the Court clarified the use of the "same elements test" set forth in Blockburger when it overruled the "same conduct" test announced in Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), and held that the Double Jeopardy Clause bars successive prosecutions only when the previously concluded and subsequently charged offenses fail the "same elements" test articulated in Blockburger. See also Gavieres v. United States, 220 U.S. 338, 345, 31 S.Ct. 421, 423, 55 L.Ed. 489 (1911) (early precedent establishing that in a subsequent prosecution "[w]hile it is true that the conduct of the accused was one and the same, two offenses resulted, each of which had an element not embraced in the other").

If Chick's criminal charges require proof of facts which, absent the entry of a consent judgment, the civil forfeiture

action would not have required to be proven, then the criminal charges cannot be said to be based upon the same offense underlying the forfeiture action. The consent judgment entered in the civil forfeiture action brought against Chick's property states that miscellaneous electronic equipment was "subject to forfeiture to the United States under 21 U.S.C. § 2513 because it was used to intercept electronic communications in violation of 18 U.S.C. § 2511." By comparison, count one of the superceding indictment alleges that for the five year period preceding July 25, 1994, Chick "knowingly and intentionally [conspired] to assemble, possess, and sell ... satellite descrambler modules" for illegal purposes. And, counts two through eighteen of the superceding indictment allege that, on the various dates specified, Chick sold illegally modified satellite descramblers.

The civil forfeiture proceeding only required proof that the seized electronic equipment was used to intercept electronic communications in violation of 18 U.S.C. § 2511. The civil forfeiture proceeding did not require proof that Chick conspired to assemble, possess or sell satellite descrambler modules or that Chick sold illegally modified satellite descramblers. Therefore, applying the "Blockburger test" to the record before us,[2] we find that the

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[2] Chick contends that the district court erred when it denied his motion to dismiss without first holding an evidentiary hearing. We do not agree.

counts contained in the superceding indictment were based on distinctly different offenses from the offense which underlies the civil forfeiture action involving electronic equipment belonging to Chick.

Chick also argues that "the Double Jeopardy Clause does not permit a court to impose additional punishment for the same offense conduct merely by relying upon the identical conduct (and nothing more) as proof of conspiracy." Chick's argument presumes that "the same offense conduct" (i.e., using the forfeited equipment to

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The written record sufficiently establishes that the civil forfeiture complaint and the criminal prosecution are not based on the same offenses. Compare United States v. One 1978 Piper Cherokee Aircraft, 37 F.3d 489, 495 (9th Cir.1994) (reversing and remanding case to the district court for a determination of whether "civil forfeiture under [21 U.S.C.] § 881(a)(4) can be predicated upon some offense other than those for which [claimant/defendant] has already been tried"); and United States v. $292,888.04 U.S. Currency, 54 F.3d 564 (9th Cir.1995) (amended) (affirming district court's finding that civil forfeiture of funds under currency reporting statute, 31 U.S.C. § 5317(c), did not punish claimant for the same drug-related offenses for which he was criminally prosecuted). Unlike One 1978 Piper Cherokee Aircraft, we find that remand for an evidentiary hearing on the double jeopardy issue is not called for in Chick's case.

illegally intercept electronic communications) "and nothing more" is alleged to support and will be used to prove the conspiracy charge. However, not only is Chick's contention disproved by the wording of the overt acts which accompany the conspiracy count contained in the indictment, but the offense of conspiracy requires proof of at least two facts which the forfeiture action did not i.e., (1) proof of an agreement to commit the substantive offense; and (2) proof of participation by the defendant.

In addition, Chick's arguments with respect to the conspiracy count are expressly foreclosed by United States v. Felix, 503 U.S. 378, 112 S.Ct. 1377, 118 L.Ed.2d 25 (1992), and United States v. Saccoccia, 18 F.3d 795 (9th Cir.1994). In Felix, the Court held that "prosecution of a defendant for conspiracy, where certain of the overt acts relied upon by the Government are based on substantive offenses for which the defendant has been previously convicted, does not violate the Double Jeopardy Clause." 503 U.S. at 380-81, 112 S.Ct. at 1380. See also Saccoccia, 18 F.3d at 798 (citing Felix, 503 U.S. at 388-89, 112 S.Ct. at 1384) ("A substantive crime and a conspiracy to commit that crime are not the same offense for double jeopardy purposes.").

According to Felix and Saccoccia, the Double Jeopardy Clause would not be violated by the forfeiture of electronic equipment used by Chick to intercept electronic communications in violation of 18 U.S.C. § 2511 and then a subsequent prosecution of Chick for conspiring to use

the same equipment for the same illegal purposes. Nevertheless, double jeopardy problems are more remote in this case because Chick is not charged with conspiring to "use the equipment to intercept electronic communications," but rather is charged with conspiring "to assemble, possess and sell" satellite descrambler modules for illegal purposes.

V. CONCLUSION

We have jurisdiction to hear an interlocutory appeal of a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds when a defendant, such as Chick, has been subjected to punishment in the form of a civil forfeiture proceeding and judgment has already been entered. However, because the civil forfeiture proceeding under 18 U.S.C. § 2513 and the criminal proceeding under 18 U.S.C. § 371 and § 2512 are based upon different offenses committed by Chick, we hold that the Double Jeopardy Clause has not been violated. The district court properly denied Chick's motion to dismiss the superceding indictment.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	)	NO. 94-30395
	)	
Plaintiff-Appellee,	)	D.C. No. CR-94-00411-WTM
	)	
v.	)	
	)	ORDER
RONALD CHICK,	)	
	)	
Defendant-Appellant.	)	
	)	

Before: BROWNING, WRIGHT, and T.G. NELSON, Circuit Judges

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA	)	NO. CR94-411M
	)	
Plaintiff,	)	ORDER
	)	
v.	)	
	)	
RONALD CHICK,	)	
	)	
Defendant.	)	
	)	

THIS MATTER comes before the Court on two motions: (1) Defendant's motion to suppress evidence and (2) defendant's motion to dismiss on double jeopardy grounds. In addition, the Court construes the defendant's statement that he will appeal an adverse ruling on the double jeopardy question as a motion to certify this issue for an interlocutory appeal. The Court, having considered the motions, memoranda, and affidavits submitted by the parties, as well as the authorities cited therein, hereby denies the motion to dismiss and grants the motion for certification of the issue as an interlocutory appeal. The Court declines to rule on the motion to suppress until resolution of the appeal.

This indictment in this case alleges that for the period of five years preceding July 25, 1994, defendants Ronald Chick ("Ronald") and Renate Chick ("Renate") conspired to assemble, possess, and sell satellite descrambler modules to

illegally facilitate unauthorized descrambling of satellite television programming without payment of subscription fees. The indictment also contains numerous counts alleging that on specified dates either Ronald and Renate collectively or Ronald by himself sold illegal descramblers. The case is set for trial on October 24, 1994.

In a prior related proceeding, the government sought forfeiture of various electronic equipment seized in searches of Ronald's home and business. United States v. Miscellaneous Electronic Equipment Valued at $116,000, No. C93-1568WD (W.D. Wash. 1994). That case was dismissed when the parties entered into a consent judgment for forfeiture, and the equipment in question was forfeited pursuant to 18 U.S.C. §§ 2511-12. Ronald contends that this forfeiture was at least in part punishment and accordingly, that the current indictment against him must be dismissed as it is barred by double jeopardy grounds. The Court does not agree.

The Court assumes without deciding that Ronald is correct when he asserts that the forfeiture was punishment for double jeopardy purposes. The question then becomes whether the forfeiture and the impending prosecution were based on the same offense. The Court concludes that they were not. As the government maintains, the conspiracy and the substantive crime are not the same crime for the purposes of double jeopardy. United States v. Saccoccia, 18 F.3d 795, 798 (9th Cir. 1994). In addition, Ronald

is not charged with possession of contraband, he is charged with the sale of descramblers on specific dates. In each instance, the sales occurred before the forfeited devices were seized. Accordingly, the motion to dismiss on double jeopardy grounds is denied.

As Ronald asserts, however, a defendant who raises a colorable double jeopardy claim is entitled to an interlocutory review of that claim. United States v. Castiglione, 876 F.2d 73, 75 (9th Cir. 1988), cert. denied, 493 U.S. 954 (1989). Accordingly, the motion to certify this issue for an immediate interlocutory appeal -- as Ronald's statements have been construed by this Court -- is granted. This matter is stayed pending the resolution of the interlocutory appeal.

The certification of this issue for an interlocutory appeal raises the issue of whether the delay in bringing this matter to trial is excludable pursuant to the Speedy Trial Act. The Court finds that the time is excludable as to Ronald pursuant to 18 U.S.C. § 3161(h)(1)(E), and that the time is excludable as to Renate pursuant to 18 U.S.C. § 3161(h)(7).

In accordance with the foregoing, Ronald Chick's motion to dismiss based on double jeopardy is DENIED. The Court's ruling on this matter is CERTIFIED for interlocutory appeal. This case is STAYED pending the resolution of this appeal. The Clerk of the Court is directed to send copies of this Order to all counsel of record.

Appendix C

DATED this 19th day of October, 1994.

/s/
WALTER T. McGOVERN
United States District Judge

APPENDIX D

18 U.S.C. § 2511.

Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who--

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when--

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment

commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to known that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e)(i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by sections 2511(2)(A)(ii), 2511(b)-(c), 2511(e), 2516, and 2518 of this subchapter, (ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation,

(ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, (iii) having obtained or received the information in connection with a criminal investigation, and (iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation,

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information,

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Intelligence Surveillance Act of 1978, if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with--

(A) a court order directing such assistance signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No provider of wire or electronic communication service, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished a court order or certification under this chapter, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any such disclosure, shall render such person liable for the civil damages provided for in section 2520. No cause of action shall

State or any political subdivision of a State, as may be appropriate. Any such disclosure, shall render such person liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of a court order or certification under this chapter.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire or electronic communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where

of the Constitution or laws of the United States or of any State.

(e) Notwithstanding any other provision of this title or section 705 or 706 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.

(f) Nothing contained in this chapter or chapter 121, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire and oral communications may be conducted.

(g) It shall not be unlawful under this chapter or chapter 121 of this title for any person--

(i) to intercept or access an electronic communication made through an

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(g) It shall not be unlawful under this chapter or chapter 121 of this title for any person--

(i) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;

(ii) to intercept any radio communication which is transmitted--

(I) by any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress;

(II) by any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public;

(III) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or

(IV) by any marine or aeronautical communications system;

(iv) to intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of such interference; or

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(h) It shall not be unlawful under this chapter--

(i) to use a pen register or a trap and trace device (as those terms are defined for the purposes of chapter 206 (relating to pen registers and trap and trace devices) of this title); or

(ii) for a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of such service.

(3)(a) Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication--

(i) as otherwise authorized in section 2511(2)(a) or 2517 of this title;

communication or an agent of such addressee or intended recipient.

(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication--

(i) as otherwise authorized in section 2511(2)(a) or 2517 of this title;

(ii) with the lawful consent of the originator or any addressee or intended recipient of such communication;

(iii) to a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

(iv) which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

(4)(a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

(b) If the offense is a first offense under paragraph (a) of this subsection and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or

the cordless telephone handset and the base unit, a public land mobile radio service communication or a paging service communication, and the conduct is not that described in subsection (5), the offender shall be fined under this title or imprisoned not more than one year, or both; and

(ii) if the communication is the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication or a paging service communication, the offender shall be fined under this title.

(c) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted--

(i) to a broadcasting station for purposes of retransmission to the general public; or

(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls,

is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.

(5)(a)(i) If the communication is--

(i) to a broadcasting station for purposes of retransmission to the general public; or

(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls,

is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.

(5)(a)(i) If the communication is--

(A) a private satellite video communication that is not scrambled or encrypted and the conduct in violation of this chapter is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or

(B) a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of this chapter is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain,

then the person who engages in such conduct shall be object to suit by the Federal Government in a court of competent jurisdiction.

person shall be subject to a mandatory $500 civil fine.

(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), and shall impose a civil fine of not less than $500 for each violation of such an injunction.

Appendix D

§ 2512. Manufacture, distribution, possession, and advertising of wire, oral, or electronic communication intercepting devices prohibited

(1) Except as otherwise specifically provided in this chapter, any person who intentionally--

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to known that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

(c) places in any newspaper, magazine, handbill

(i) any electronic, mechanical, or other device knowing or having reason to know

oral, or electronic communications; or

(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire, oral, or electronic communications,

knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce,

shall be fined under this title or imprisoned not more than five years, or both.

(2) It shall not be unlawful under this section for--

(a) a provider of wire or electronic communication service or an officer, agent, or employee of, or a person under contract with, such a provider, in the normal course of the business of providing that wire or electronic communication service, or

(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of activities of the United States, a State or a political subdivision thereof,

to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it

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to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications.

Appendix D

§ 2513. Confiscation of wire, oral or electronic communication intercepting devices

Any electronic, mechanical, or other device used, sent, carried, manufacture, assembled, possessed, sold, or advertised in violation of section 2511 or section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

Supreme Court, U.S.
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(2)

No. 95-858

In the Supreme Court of the United States

OCTOBER TERM, 1995

RONALD CHICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars petitioner's prosecution for 17 substantive counts of selling illegally modified electronics equipment and one count of conspiracy to "assemble, possess, and sell" illegally modified electronics equipment after the forfeiture of illegally modified equipment different from that forming the basis for the substantive counts.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 61 F.3d 682. The order of the district court denying petitioner's motion to dismiss (Pet. App. 17a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1995. A petition for rehearing was denied on August 31, 1995. Pet. App. 16a The petition for a writ of certiorari was filed on November 29, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury in the Western District of Washington returned an 18-count superseding indictment charging petitioner with conspiracy to sell illegally modified satellite descramblers, in violation of 18 U.S.C. 371, and 17 counts of selling illegally modified satellite descramblers, in violation of 18 U.S.C. 2512(1)(b). Before trial, petitioner moved to dismiss the indictment on the ground that the prosecution was barred by the Double Jeopardy Clause. The district court denied the motion, and petitioner took an interlocutory appeal. The court of appeals affirmed. Pet. App. 1a-15a.

1. On March 30, 1993, an FBI special agent obtained warrants to search petitioner's Seattle home and a storage locker that petitioner had rented. The affidavit in support of the application alleged that petitioner recently had illegally modified or sold illegally modified television "descrambler modules" that allowed users to receive cable and satellite television channels for which they had not paid. Gov't C.A. Br. 3. On April 1, 1993, federal law enforcement officers executing the warrant seized a variety of television and electronics equipment, including more than 50 satellite television descramblers. Pet. App. 2a.

2. On November 19, 1993, the government filed a civil complaint seeking forfeiture of some of the equipment seized from petitioner's residence. The complaint alleged that on March 19, 1993, a confidential informant had purchased an illegally modified cable descrambler from petitioner and that petitioner had given the informant 44 key codes necessary to obtain encrypted cable television programs.

Gov't C.A. Br. 4. Based on that incident, the complaint alleged that the seized equipment was used to intercept scrambled or encrypted satellite video communications, in violation of 18 U.S.C. 2511, and therefore was subject to forfeiture under 18 U.S.C. 2513. Pet. App. 2a-3a.

On August 30, 1994, petitioner and the government entered into a consent judgment to settle the forfeiture action. In the consent judgment, petitioner agreed to the forfeiture of 13 categories of equipment seized from his home "without further adjudication of any issue of fact or law." The forfeited equipment consisted primarily of various types of descramblers and descrambler modules. The government also agreed to return a substantial quantity of the seized electronics equipment, including tools, stereo equipment, televisions, remote controls, and some descramblers. Gov't C.A. Br. 4; Pet. App. 3a.

On July 26, 1994, petitioner and his sister, Renate Ann Chick, were charged with conspiracy to "assemble, possess, and sell" satellite descrambler modules that would allow the descrambling of satellite television programming without payment of subscription fees. Pet. App. 3a. The indictment further alleged, as overt acts in furtherance of the conspiracy and as individual counts, that petitioner had sold illegal descrambler units on 12 different occasions, in violation of 18 U.S.C. 2512(1)(b). Gov't C.A. Br. 5. On October 18, 1994, the grand jury returned a superseding indictment that added five more counts charging that petitioner had sold illegal descrambler units. Pet. App. 3a.

Petitioner moved to dismiss the indictment, alleging that the prior civil forfeiture of some of the equipment seized from his home had punished him for

the conduct charged in the indictment and thus that his conviction on the indictment would constitute a second punishment for the same offense, in violation of the Double Jeopardy Clause. The district court denied the motion. Pet. App. 17a-20a. The court assumed without deciding that the prior civil forfeiture constituted punishment for purposes of the Double Jeopardy Clause. It held, however, that the criminal prosecution did not seek to punish petitioner for the "same offense" as the civil forfeiture. *Id.* at 18a-19a. According to the district court, the civil forfeiture rested on petitioner's possession of certain illegal descrambling devices. By contrast, the district court held, the indictment alleged that petitioner had sold different illegal descrambling devices. *Id.* at 19a. The court also found that the conspiracy charged in the indictment was a different offense from the forfeiture based on petitioner's possession of the devices. *Id.* at 18a.

4. Petitioner took an interlocutory appeal, and the court of appeals affirmed. Pet. App. 1a-15a. The court first found that it had jurisdiction over petitioner's appeal. *Id.* at 4a-8a. Citing *Abney* v. *United States*, 431 U.S. 651 (1977), the court held that the district court's order denying petitioner's motion to dismiss was an immediately appealable collateral order. The court acknowledged that "[t]he constitutional right directly involved in *Abney* was the right to avoid a second trial" and that petitioner's "claimed right is the right to avoid a second punishment." Pet. App. 6a-7a. It held, however, that petitioner could bring an immediate appeal because "if the defendant is convicted, and punishment imposed, then the constitutional right not to be doubly punished is lost, even if vindicated on appeal." *Id.* at 7a.

On the merits, the court of appeals held that forfeiture under 18 U.S.C. 2513, the statute under which the government had sought forfeiture of the seized equipment, constituted punishment for purposes of the Double Jeopardy Clause. The court held, however, that the civil forfeiture did not impose punishment for the "same offense" as any of those charged in the indictment against petitioner. The court noted that the civil forfeiture rested on allegations that petitioner used the forfeited equipment "to intercept electronic communications in violation of 18 U.S.C. § 2511." Pet. App. 12a. By contrast, the indictment charged that petitioner had conspired to "assemble, possess, or sell" satellite descrambler equipment and that petitioner had sold illegally modified descramblers on specific occasions. Applying the test set forth in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), the court held that "the counts contained in the superceding indictment were based on distinctly different offenses from the offense which underlies the civil forfeiture action." Pet. App. 12a-13a.

The court also held that the conspiracy charged in the indictment was a separate offense from the civil forfeiture "offense" because "the offense of conspiracy requires proof of at least two facts which the forfeiture action did not i.e., (1) proof of an agreement to commit the substantive offense; and (2) proof of participation by the defendant." Pet. App. 14a. Finally, the court relied on this Court's decision in *United States* v. *Felix*, 503 U.S. 378, 389 (1992), which held that "a substantive crime and a conspiracy to commit that crime are not the 'same offence' for double jeopardy purposes." On the basis of that holding, the court of appeals held that "the Double Jeop-

ardy Clause would not be violated by the forfeiture of electronic equipment used by [petitioner] to intercept electronic communications in violation of 18 U.S.C. § 2511 and then a subsequent prosecution of [petitioner] for conspiring to use the same equipment for the same illegal purposes." Pet. App. 14a-15a.

ARGUMENT

Petitioner raises two challenges to the court of appeals' rejection of his double jeopardy claim. First, he contends (Pet. 13-22) that the court erred because it applied the test set forth in *Blockburger* v. *United States*, 284 U.S. 299 (1932), to determine whether the civil forfeiture imposed punishment for the "same offenses" as those charged against him in the criminal indictment. Second, he asserts that the court of appeals erroneously concluded that the conspiracy charged in the indictment and the offenses underlying the conspiracy are not the "same offense" for double jeopardy purposes. Those claims do not warrant further review.

1. The Double Jeopardy Clause prohibits the imposition of multiple punishments for the same offense in separate proceedings. See *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). In *United States* v. *Halper*, 490 U.S. 435 (1989), this Court held that after imposition of a criminal punishment, the Clause's "multiple punishments" prohibition barred imposition of a civil penalty that is "so extreme and so divorced from the Government's damages and expenses as to constitute punishment." *Id.* at 442. Subsequently, in *Austin* v. *United States*, 113 S. Ct. 2801 (1993), the Court held that a forfeiture of certain property used to facilitate narcotics offenses, pursuant to 21 U.S.C.

881(a)(4) and (a)(7), is subject to review under the Excessive Fines Clause of the Eighth Amendment.

Relying on *Halper* and *Austin*, the Ninth Circuit has held that a civil forfeiture of drug proceeds under 21 U.S.C. 881(a)(6) invariably constitutes punishment for purposes of the multiple punishments prong of the Double Jeopardy Clause. See *United States* v. *$405,089.23*, 33 F.3d 1210 (9th Cir. 1994), cert. granted, No. 95-346 (Jan. 12, 1996) (to be argued Apr. 17, 1996). But see *United States* v. *184,505.01*, 72 F.3d 1160 (3d Cir. 1995) (forfeiture of proceeds of drug trafficking is wholly remedial and accordingly does not inflict "punishment"); *United States* v. *Salinas*, 65 F.3d 551 (6th Cir. 1995) (same); *United States* v. *Tilley*, 18 F.3d 295 (5th Cir.) (same), cert. denied, 115 S. Ct. 573 (1994). The Fifth and Sixth Circuits have held that the forfeiture of property used to facilitate the commission of a drug crime, under 21 U.S.C. 881(a)(7), constitutes punishment for that crime. See *United States* v. *Perez*, 70 F.3d 345 (5th Cir. 1995); *United States* v. *Ursery*, 59 F.3d 568 (6th Cir. 1995), cert. granted, No. 95-345 (Jan. 12, 1996) (to be argued Apr. 17, 1996).

Petitioner's claim rests on the premise that the forfeiture of the satellite descrambler units seized from him likewise constitutes punishment for double jeopardy purposes. Even if correct, that claim is not properly before this Court, because the court of appeals lacked jurisdiction to consider it. In *Abney* v. *United States*, 431 U.S. 651 (1977), this Court held that a pretrial order rejecting a claim of former jeopardy may be raised by a defendant in an interlocutory appeal when it is premised on the right not to be "twice put to trial for the same offense." *Id.* at 661 (emphasis omitted). The Court suggested, however,

that a pure multiple punishments claim, such as petitioner raises, would not be similarly appealable, because "that aspect of the right can be fully vindicated on an appeal following final judgment." *Id.* at 660.

This Court's decision in *Witte* v. *United States*, 115 S. Ct. 2199 (1995), does not warrant a different result. In that case, the Court recognized that the Double Jeopardy Clause prohibits the government from "*attempting* a second time to punish criminally[] for the same offense." *Id.* at 2204 (emphasis partially omitted). *Witte*, however, presented no question of appellate jurisdiction, because the district court had dismissed the indictment on double jeopardy grounds, see *id.* at 2203-2204, and the court of appeals accordingly had jurisdiction over the government's appeal under 18 U.S.C. 3731. For that reason, the *Witte* Court addressed only whether the petitioner's claim was premature, not whether it was appealable. The fact that a double jeopardy claim may be ripe for adjudication by a district court (as is true of many other pretrial claims, including suppression claims) does not mean that a court's rejection of the claim is immediately appealable on an interlocutory basis. Because the right not to be subject to impermissible multiple punishments can be completely vindicated on appeal from a conviction and sentence, the court of appeals erred in asserting appellate jurisdiction over petitioner's interlocutory appeal.[1]

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[1] The courts of appeals are divided over this issue. Compare *United States* v. *Ramirez-Burgos*, 44 F.3d 17, 18-19 (1st Cir. 1995) (finding no right of interlocutory appeal for multiple punishments claim) with Pet. App. 4a-8a (finding right of appeal); *United States* v. *Perez*, 70 F.3d 345 (5th Cir. 1995)

2. In any event, petitioner's double jeopardy claims are without merit.

a. *Substantive counts.* Even if the statute under which petitioner's equipment was forfeited, 18 U.S.C. 2513, generally defined the "same offense" as the substantive offenses charged in the present indictment under 18 U.S.C. 2511, petitioner would not be entitled to relief. That is because, even if the same offense (or greater- and lesser-included offenses) supported both the forfeiture proceeding and the substantive criminal charges, petitioner committed that offense multiple times on separate occasions. There is no reason why he may not receive a separate punishment for each violation.

The government obtained the forfeiture of the seized equipment because that equipment had been "used, sent, carried, manufactured, assembled, possessed, sold, or advertised" in violation of 18 U.S.C. 2511. Thus, if the forfeiture constituted "punishment," it imposed punishment on petitioner for using, manufacturing, possessing, or selling the seized equipment in violation of Section 2511. The 17 substantive counts of the indictment, however, are not based on petitioner's use, manufacture, possession, or sale of the seized equipment. Instead, those counts charge him with the sale of illegal satellite descrambler modules between 1990 and March 19, 1993. Nothing in the record suggests, and petitioner does not claim, that any of the forfeited equipment was the same equipment that he is charged with illegally selling in Counts 2 through 18 of the indictment. Thus, if petitioner is convicted on Counts 2 through

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(same); *United States* v. *Baird*, 63 F.3d 1213 (3d Cir. 1995) (same), cert. denied, No. 95-630 (Feb. 20, 1996).

18, he will be punished for the individual sales that form the basis for those counts, not for the illegal use of different equipment that he forfeited to the government. Cf. *United States* v. *Felix*, 503 U.S. 378, 385 (1992) (offenses are distinct when they involve "no common conduct").

For the reasons given above, petitioner would not be assisted even if he were correct in contending (Pet. 14-22) that the court of appeals erred in employing the *Blockburger* "same elements" test to determine whether the prior civil forfeiture imposed punishment for the "same offenses" as those charged in the substantive counts of the criminal indictment. Nevertheless, petitioner's contention that the *Blockburger* test does not apply to multiple punishment cases is without merit. This Court has expressly held that the "same elements" test announced in *Blockburger* v. *United States* applies "[i]n both the multiple punishment and multiple prosecution contexts." *United States* v. *Dixon*, 113 S. Ct. 2849, 2856 (1993). In *Dixon*, moreover, the Court overruled *Grady* v. *Corbin*, 495 U.S. 508 (1990), which had construed the Double Jeopardy Clause to protect against successive uses of the "same conduct" in criminal prosecutions against a defendant.[2]

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[2] *United States* v. *Halper*, 490 U.S. 435 (1989), and *Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct. 1937 (1994), are not to the contrary. The only issue before the Court in *Halper* was whether, following a criminal conviction, "a civil penalty may constitute 'punishment' for the purposes of double jeopardy analysis." 490 U.S. at 436. Similarly, the Court in *Kurth Ranch* stated that "we ask only whether the tax [imposed following the criminal conviction in that case] has punitive characteristics that subject it to the constraints of the Double Jeopardy Clause." 114 S. Ct. at 1945. In both cases, the

b. *Conspiracy count.* Petitioner's challenge to the conspiracy count is equally unfounded. Petitioner acknowledges (Pet. 22-23) that in *Felix*, this Court held that "a substantive crime and a conspiracy to commit that crime are not the 'same offence' for double jeopardy purposes." See *Felix*, 503 U.S. at 389. Accord *Garrett* v. *United States*, 471 U.S. 773, 778 (1985); *Iannelli* v. *United States*, 420 U.S. 770, 781-782 (1975); *United States* v. *Feola*, 420 U.S. 671, 693 (1975); *Callanan* v. *United States*, 364 U.S. 587 (1961); *Pinkerton* v. *United States*, 328 U.S. 640, 643-644 (1946). That rule is based on the fact that proof of a conspiracy requires proof of an agreement, while proof of a substantive offense does not. See, *e.g.*, *United States* v. *Bayer*, 331 U.S. 532 (1947). Thus, even if the government's proof at trial of the alleged conspiracy would include evidence of the conduct that led to the forfeiture, the conspiracy is a separate offense from the "offense" punished by the forfeiture.

Petitioner argues (Pet. 25) that the court of appeals' decision "stretches *Felix* too far by suggesting that punishment for a substantive crime and a later attempt to impose punishment for a conspiracy to commit that same crime will never lead to a double jeopardy violation." Nothing in *Felix* suggests that the Court intended to impose any limitations on its holding, however; to the contrary, the Court referred to the rule it stated in *Felix* as "established doctrine" and refused to limit its application by applying the "same conduct" test of *Grady* v. *Corbin*, 495 U.S. 508

Court therefore had no occasion to consider whether the "offenses" underlying the civil penalty or tax and that underlying the criminal prosecution were the same.

(1990), overruled by *United States* v. *Dixon*, 113 S. Ct. 2849 (1993).

Nor is there any merit to petitioner's assertion that the Court's decision in *Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct. 1937 (1994), casts doubt on the validity of *Felix*. In *Kurth Ranch*, the Court held that, following the criminal prosecution of the Kurths, a proceeding initiated to collect a tax on the "possession and storage" of illegal drugs "was the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time 'for the same offence.'" *Id.* at 1948. The Court declined to address the claim that respondents who had been convicted only of conspiracy to commit the underlying drug offenses lacked standing to challenge the tax, because that claim had not been raised below. See *id.* at 1942 n.9. Accordingly, the Court had no occasion to consider the application of the *Felix* rule in *Kurth Ranch*.

3. There is no reason to hold this case pending the disposition of *United States* v. *Ursery*, No. 95-345, and *United States* v. *$405,089.23*, No. 95-346 (both cases to be argued Apr. 17, 1996). In *$405,089.23*, the Ninth Circuit held that civil judicial forfeiture of drug proceeds under 21 U.S.C. 881(a) invariably constitutes punishment under the Double Jeopardy Clause. In *Ursery*, the Sixth Circuit held the civil judicial forfeiture of property used to facilitate a drug crime under 21 U.S.C. 881(a)(7) always amounts to punishment for double jeopardy purposes.

The government's brief in those consolidated cases argues that civil forfeiture followed by criminal prosecution does not raise double jeopardy concerns, that the forfeitures at issue do not constitute punishment, that civil forfeiture and the criminal offense on

which it rests are never the "same offense" under the Double Jeopardy Clause, and that parallel civil forfeiture and criminal proceedings constitute a single proceeding for purposes of the multiple punishments prong of the Double Jeopardy Clause.

Although this Court's acceptance of the government's arguments in *Ursery* and *$405,089.23* would provide additional grounds on which to reject petitioner's claims, a decision favorable to the respondents in those cases would not provide petitioner with a ground for relief. As set forth above, petitioner cannot obtain dismissal of the substantive counts of the indictment under any view of the Double Jeopardy Clause. And a straightforward application of *Felix* is dispositive of petitioner's challenge to the conspiracy count.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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